



**IRCP**

Institute for International Research on Criminal Policy  
Ghent University

Prof. Dr. G. Vermeulen – Mutual Recognition in Practice: Gathering and Using Foreign Evidence – Trier, 7 July 2009

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# Mutual Recognition in Practice: Gathering and Using Foreign Evidence

Prof. Dr. Gert Vermeulen

Summer Course on European Criminal Justice  
ERA – Trier, 7 July 2009



## Structure

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- > introduction
  - > investigation in criminal matters & evidence
- > problems in practice
  - > perspective taken
  - > scenarios of information/evidence gathering/use
    - > analysis – evaluation – discussion
  - > beyond
- > questions & discussion



## Investigation in criminal matters & evidence (1)

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- obtaining existing (available) evidence
  - house search
  - freezing order (with 3rd parties)
  - seizure (often requiring house search)
  - order to provide/allow access to
- obtaining “new” evidence
  - hearing, confrontation, covert investigations, analysis, expertise
- obtaining evidence “in real time”
  - interception telecommunication
  - covert investigations
  - monitoring bank accounts



## Investigation in criminal matters & evidence (2)

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- > current legal instruments
  - > [overview](#)
  - > principal rules of play
    - > inter-state cooperation
    - > exequatur or transfer procedure
    - > compatibility with law requested state
    - > dual criminality
- > MR plan
  - > remove obstacles in contexts (house) search/seizure
  - > remove/tackle fiscal or ordre public exceptions
  - > recognition of orders freezing evidence



## Investigation in criminal matters & evidence (3)

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- > forthcoming instruments
  - > at international/EU level
    - > to be implemented into domestic law
  - > principal rules of play
    - > between locally competent judicial authorities
    - > no more exequatur or transfer procedures
    - > blind recognition – via order+certificate or warrant
    - > dual criminality requirement basically abandoned
    - > refusal for (disguised) fiscal reasons further restricted
- > which EU legal instruments?
  - > European Freezing Order 2003
  - > Protocol 16 October 2001
  - > European Evidence Warrant 2008
  - > European Pre-Evidence Warrant?
  - > MR order/warrant for all forms of MLA?



## European Freezing Order 2003

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- > immediate execution (within 24 hours)
- > of freezing orders, aimed at preventing transfer, destruction, conversion, disposition or movement etc of objects, documents or data which could be produced as evidence in criminal proceedings in the issuing MS
- > if accompanied by standard certificate
- > no exequatur procedure
- > no dual criminality check for offences
  - > punishable in issuing MS with +3 years
  - > and appearing in the standard list of 32 “warrant” offences
- > freezing maintained until transmission
  - > following a separate request to that end





## Protocol 16 October 2001

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- further reduction (disguised) fiscal exception
  - no banking secrecy exception allowed
  - acquis 1978 “fiscal” protocol to 1959 ECMA integrated
  - 2x without possible recourse to reservations
  - effectiveness dependant on state’s willingness to ratify
- Article 1: information about (existence) bank accounts
  - owned or controlled (as proxy) by (legal) person
- Article 2: information about specific accounts/transactions
- Articles 1-2
  - may be subjected to search/seizure restrictions
  - however: evidence warrant (infra)
- Article 3: ‘monitoring’ bank accounts: bank account tap



## European Evidence Warrant 2008 (1)

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- > execution within strict time limits of requests
  - > for transmission of objects, documents and data
  - > for seizure, transfer, house search
- > via uniform European Evidence Warrant
- > no conversion or exequatur procedure
- > no dual criminality check if
  - > no house search is required
  - > offence in 32-list
  - > Germany allowed opt-out
    - > reintroduction dual criminality check for 6/32 offences





## European Evidence Warrant 2008 (2)

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- > fast/efficient mechanism for obtaining existing evidence
  - > including accounts/transactions (Articles 1-2 Protocol 2001)
  - > not for new evidence gathering
  - > not for evidence gathering in real time, such as through telecom or bank account tapping
- > additional fd's announced
  - > ultimately to be consolidated in a single instrument
  - > that can replace mutual assistance altogether
    - > including new EU instruments: 2000 EU-MA/2001 Protocol
- > mutual recognition evidence?
  - > yes, if lawfully collected in locus MS!
- > access to info on servers on non-EU territory
  - > yes, if lawfully accessible from territory executing MS
  - > = beyond CoE Cybercrime Convention



## Broad perspective

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- > gathering & using foreign evidence - unlike in title
  - > problems not limited to “foreign” evidence only
    - > also: evidence gathered by foreign JIT members
  - > problems not limited to “evidence” only
    - > also: information
- > various spheres/elements in discussion
  - > regular mutual legal assistance (MLA)
  - > cooperation in joint investigation teams (JITs)
  - > (future) “mutual recognition (MR)” -based MLA
  - > police cooperation/Europol
  - > Principle of Availability (PoA)
  - > FD data protection 3rd pillar
  - > forum choice (involving Eurojust)



## Scenarios of info/evidence gathering/use

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- > where gathered
  - > in another MS, in a 3rd state, internally?
- > by whom (foreign/own authorities?)
- > context of gathering
  - > primarily internal purposes, following MLA request, in JIT context?
- > status (existing, new, real-time?)
- > type of measures required?
  - > coercive/intrusive/privacy-invading?
- > type of source (administrative, military, criminal justice?)
- > type of purpose of use? (similar as for source)
- > use (information/pre-evidence, evidence)
- > in context of police (LE) or judicial cooperation?



## Where/By whom/Context

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- > relevant scenario combinations
  - > abroad (in another MS - in a 3rd state)
    - > by local authorities for primarily internal purposes
    - > by local authorities following regular MLA request
    - > by local/foreign authorities in JIT context (JIT operating abroad)
    - > by local authorities in JIT context (JIT operating elsewhere), following request by local JIT-member
    - > by own authorities in JIT context (JIT operating abroad)
  - > internally
    - > by foreign authorities in JIT context



## Abroad (1)

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- > information
  - > internally collected – later transferred
    - > acceptable, often even where not in accordance with own legal system
  - > if collected following request for investigative measures which would not be acceptable in own system
    - > exclusion?
  - > lawfully collected by JIT member
    - > may be used in all JIT-involved states (para 10)



## Abroad (2)

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- > evidence
  - > internally collected – later transferred
    - > acceptable, except usually where (manifestly) not in accordance with own legal system
  - > in accordance with fundamental principles of domestic legal system and with own legislation (forum regit actum following MLA request)
  - > in JIT context (i.e. locus regit actum): no guaranteed evidential use
    - > by local authorities, either when JIT operating abroad or following request local JIT member when team operates elsewhere
    - > by own authorities, where bestowed with investigative powers (locus regit actum) and within national mandate
      - > strict dual locus check
      - > additional questions: mandated to draw up official domestic reports? having evidential value back home?
    - > by foreign authorities, where bestowed with investigative powers and within national mandate
      - > worst case scenario = strict triple locus check





## Internally

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- > i.e. by foreign authorities in JIT context
  - > where bestowed with investigative powers
  - > and within their national mandate
- > distinction
  - > information
    - > no problem
  - > evidence
    - > mandated to draw up reports having domestic evidential value in MS of evidence gathering?



## Assessment

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- JIT-collected information
  - may be used as information
    - depending on JIT treaty basis
      - which treaty – applicability
    - in the absence of applicable SE convention provision
      - fully depending on domestic legislation
      - of all states involved (compatibility issue)
  - no guaranteed use as evidence whatsoever
    - due to locus regit actum rule
    - for evidential purpose therefore
      - inferior to information collected through forum regit actum-based MLA request



## Status (1)

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- > scenarios
  - > existing
  - > new
    - > requires investigative measure/execution of request
- > real-time
  - > telecom interception & bank account monitoring



## Status (2)

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- > relevance
  - > regular MLA: irrespective of status
  - > JIT-cooperation
    - > possible advantages: request home, right to presence, active investigative position
    - > as for existing information/evidence: inferior to
      - > PoA: obligation to provide LE-relevant information
      - > European Evidence Warrant
    - > as for new/real-time information
      - > inferior to announced full replacement MLA with binding MR-based orders/warrants issued by forum state, rendering (almost) automatically information evidence-worthy



## Type of measures required

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- > Y/N coercive/intrusive/privacy-invading?
- > relevance for police cooperation
  - > Schengen (Article 39): “for police use only” info exchange only where no coercive/... measures are required
  - > JIT cooperation: no improvement
  - > as opposed to: Prüm Treaty, PoA (for existing information)
- > relevance for judicial cooperation
  - > regular MLA: dual criminality + compatibility law requested state
  - > JIT cooperation: no changes
  - > as opposed to
    - > for existing evidence: European Evidence Warrant
      - > no dual criminality requirement for 32 offences
    - > for new/real-time evidence: announced MLA-replacement with MR
      - > similar irrelevance dual criminality
      - > Shift to primarily law executing state



## Type of source

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- > traditionally
  - > criminal intelligence operation or criminal investigation/proceedings
- > trend
  - > administrative/military (OLAF, terrorism, Echelon ...)
  - > violating upon purpose limitation principle and upon separation of powers
- > JIT cooperation
  - > traditional cooperation in criminal matters
  - > luckily! also for practitioners?





## Type of purpose of use (specialty rule)

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- > traditional police cooperation
  - > Schengen/Europol
    - > prevention and detection criminal/administrative offences
    - > preventing immediate/serious threat to public security
- > traditional judicial cooperation
  - > regular MLA
    - > criminal proceedings (including administrative offences)
    - > related judicial + administrative proceedings
    - > preventing immediate and serious threat to public security
    - > other use on request
- > proposed FD data protection police & judicial cooperation
  - > similar
- > as opposed to JIT cooperation
  - > limited in 1st instance to only investigated offences



## Beyond

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- > full MR in “pre-evidence” cooperation?
  - > instead of MR mitigated by equivalent access principle
  - > genuine “pre-evidence” warrant for use in criminal intelligence operation or criminal investigation/proceedings
  - > to be issued by police, customs + even: judicial authorities
- > mutual recognition evidence
  - > as contemplated by EC: if gathered lawfully in locus state: per se admissible?
    - > bypassing judicial review/scrutiny in MS?
- > better options?
  - > minimum harmonization of criminal procedural law standards?
  - > MR of procedural guarantees?
  - > combined with MR of evidence gathered accordingly
  - > see: Lisbon Treaty
  - > current IRCP study on evidence gathering



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## Questions & dicussion

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